

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

SYLVIA HINTON AND SHIRLEY GEE,
Plaintiffs

V.

NO. 4:90CV112-B-O

THE CATO CORPORATION,
Defendant

MEMORANDUM OPINION

This cause comes before the court on plaintiff Hinton's motion for an award of attorney fees and litigation expenses and the defendant's motion for attorney's fees. The court has duly considered the motions and exhibits and is ready to rule.

I. INTRODUCTION

The plaintiffs alleged discriminatory practices in employment on the part of the defendant. The court conducted a bench trial and, at the close of the plaintiffs' case in chief, dismissed all of plaintiff Gee's claims and plaintiff Hinton's constructive discharge claim on the ground that it was not incorporated or raised in any EEOC charge. The court found racial discrimination on the part of the defendant's management in failing to reprimand a white employee for using racially hostile remarks and giving preferential treatment to the white employee, resulting in plaintiff Hinton's disparate pay. The court awarded Hinton back pay for the difference in pay in the sum of \$95.34.

II. PLAINTIFF HINTON'S MOTION FOR ATTORNEY FEES

Under 42 U.S.C. § 2000e-5(k), the court, in its discretion, may allow the prevailing party a reasonable attorney's fee,

including expert fees, as part of the costs. Plaintiff Hinton seeks an award in the sum of \$30,491.20. The defendant argues that Hinton was not the prevailing party for attorney's fees purposes. Plaintiffs may be considered prevailing parties under 42 U.S.C. § 1988¹ if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433, 76 L.Ed.2d 40, 50 (1983).

The Supreme Court later concluded:

[A] plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. ___, 121 L.Ed.2d 494, 503 (1992). The Court in Farrar held that a plaintiff awarded nominal damages in the sum of \$1.00 is a prevailing party:

No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment.... A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay.

Id. at ___, 121 L.Ed.2d at 504. Once the parties' legal relationship has been materially altered, "the degree of the plaintiff's overall success goes to the reasonableness of the award

¹The statutory threshold is equally applicable to Title VII actions. Section 1988 was patterned on the attorney's fees provisions of Title VII. Hanrahan v. Hampton, 446 U.S. 754, 758 n.4, 64 L.Ed.2d 670, 675 n.4 (1980) cited in Slade for Estate of Slade v. United States Postal Service, 952 F.2d 357, 361 (10th Cir. 1991) ("cases addressing prevailing party status under § 1988 govern cases brought pursuant to § 2000e-5(k)").

under Hensley, not to the availability of a fee award vel non." Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S.782, 792-93, 103 L.Ed.2d 866, 878 (1989). The plaintiff obtains redress from the defendant through "some action (or cessation of action) by the defendant that the judgment produces -- the payment of damages, or some specific performance, or the termination of some conduct. Hewitt v. Helms, 482 U.S. 755, 761, 96 L.Ed.2d 654, 662 (1987).

The court finds that Hinton prevailed on a significant issue of disparate pay based on racial discrimination and obtained "some relief on the merits." Regardless of the amount awarded, Hinton's judgment directly affects the legal relationship between Hinton and the defendant. Therefore, Hinton is eligible for an attorney's fees award as the prevailing party.

The defendant objects to the itemization of services submitted by the plaintiffs' counsel on the ground that it does not delineate between Hinton's claims and Gee's claims or between Hinton's claims of constructive discharge and disparate pay. With regard to setting fee awards in cases in which the plaintiff has not achieved complete success, the Court in Garland stated:

Where the plaintiff's claims are based on different facts and legal theories, and the plaintiff has prevailed on only some of those claims, we indicated that '[t]he congressional intent to limit [fee] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.'

Garland, 489 U.S. at 789, 103 L.Ed.2d at 875 (quoting Hensley, 461

U.S. at 435, 76 L.Ed.2d at 51). The court finds that the itemization of the services rendered by the plaintiffs' counsel lacks an identifiable nexus to Hinton's disparate pay claim and is thus inadequate to make an equitable determination of a reasonable fee award. Accordingly, plaintiff Hinton will be granted an opportunity to submit an amended itemization.

III. DEFENDANT'S MOTION FOR ATTORNEY'S FEES

The defendant moves for an award of attorney's fees in the sum of \$27,498.75 against plaintiff Gee. Gee alleged racial discrimination based on failure to promote, disparate pay, and constructive discharge. On the defendant's motion to dismiss at the close of the plaintiffs' case in chief, the court dismissed Gee's claims of failure to promote and constructive discharge on the ground that these claims were not incorporated in her EEOC charge. Her EEOC charge alleged only disparate pay based on race. Gee's claim of disparate pay was dismissed on its merits. The court found that Gee's salary exceeded that of other similarly situated employees.

The defendants seek attorney's fees under 42 U.S.C. § 2000e-5(k) which reads in pertinent part:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs....

The United States Supreme Court has held that a prevailing defendant should not be awarded attorney's fees in a Title VII action unless the court finds:

that the plaintiff's action was frivolous, unreasonable, or without foundation, even

though not brought in subjective bad faith.

. . . .

...or that the plaintiff continued to litigate after it clearly became [frivolous, unreasonable, or groundless]....

Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22, 54 L.Ed.2d 648, 657 (1978).

In support of her disparate pay claim, Gee testified that, as a sales associate, she performed some of the job duties of the head cashier position held by a white employee who was paid a higher salary. The court dismissed the claim based on the comparatively lower salary of other sales associates. The court finds that since Gee had an arguable basis to compare her salary to that of the white employee, her disparate pay claim was not frivolous. With respect to Gee's claims of failure to promote and constructive discharge, the court's jurisdiction was in issue in that claims not expressly raised in an EEOC charge may fall within the reasonable scope of the EEOC's investigation and thus within the court's jurisdiction. The court finds that plaintiff Gee should not be penalized for continuing to litigate these claims, particularly in light of the fact that the defendant failed to move for summary judgment on the ground of failure to exhaust administrative remedies. In any event, the defendant did not "prevail" on these claims. Keene Corp. v. Cass, 908 F.2d 293, 297-98 (8th Cir. 1990) (a defendant is not the prevailing party as to claims dismissed for lack of subject matter jurisdiction).

For the foregoing reasons, the court finds that the defendant

is not entitled to a fee award against plaintiff Gee as a prevailing Title VII defendant.

An order will issue accordingly.

THIS, the _____ day of December, 1994.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE